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1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF MINNESOTA

3 Case No. 19-33190-wjf

5 | In the Matter of:

6

7 MARY JANE RYAN,

8

9 Debtor.

11

12 United States Bankruptcy Court

13 316 North Robert Street

14 St. Paul, MN 55101

15

16 September 30, 2020

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21 B E F O R E :

22 HON WILLIAM J. FISHER

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

Page 2

1 HEARING re Court's decision.  
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25 Transcribed by: Sonya Ledanski Hyde

Page 3

1 A P P E A R A N C E S :

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7

8 BY: DANIEL E. GARRISON (TELEPHONICALLY)

9

10 UNITED STATES DEPARTMENT OF JUSTICE

11 Attorneys for The United States Trustee

12 316 N. Robert Street

13 St. Paul, MN 55101

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15 BY: COLIN KREUZIGER (TELEPHONICALLY)

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1 P R O C E E D I N G S

2 CLERK: Good Morning. We're going to  
3 go on the record in the Mary Jane Ryan matter,  
4 19-33190. This is on a motion to avoid a -- the  
5 agreements. Let's me get the appearances for the  
6 record. Do I have Mr. Kreuziger on the line for  
7 the U.S. Trustee?

8 MR. KREUZIGER: Yes, Your Honor. Good  
9 morning.

10 THE COURT: Good morning. Do I have a  
11 Mr. Garrison on the line for Mr. Russell?

12 MR. GARRISON: Yes, Your Honor. Good  
13 morning.

14 THE COURT: Do I have anyone else on  
15 the line who wishes to make an appearance?

16 Okay. In that case, I'll start. Let  
17 me go through a couple of rules, I suppose,  
18 first. Please put your phones on mute. You  
19 won't be doing any talking during the point --  
20 during the part that I'm reading the decision.

21 Also, please do not interrupt me during  
22 the decision. If you have -- I will ask -- I  
23 will give you a chance to talk at the end of the  
24 hearing. Not to argue with the decision, but  
25 rather to -- if there's any clarification. Is

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1 there anything else you need to know but we can  
2 deal with it at the end.

3 So, I appreciate that. And with that,  
4 I will start. And I -- the parties know what's  
5 in dispute here, it's basically Mr. Russell's  
6 fees of \$2000 post-petition.

7 I will file findings of fact -- I will  
8 not read those -- I will file the findings of  
9 fact later today. Along with the -- with a very  
10 brief order. What I'm going to read on the  
11 record will be incorporated into the final  
12 decision in the order itself.

13 As well the findings of fact. And I  
14 will also file a list of the cases that I cite so  
15 if I miscite a case here, or you -- I'm talking  
16 too quickly and you can't write it down quickly  
17 enough, it will -- you will see the name of the  
18 case in the list that I will file also today.  
19 So, all those will be filed by the end of the day  
20 today. With that, here's my decision.

21 The fees allowed to Mr. Russell are  
22 reduced to \$1285.50 for the reasons stated today.

23 Since the U.S. Trustee has not argued  
24 that bifurcated fee agreements in Chapter 7  
25 consumer cases are per se impermissible, I will

1 not address that issue.

2                   Further, I'm not considering the  
3 enforceability of the fee arrangement as the  
4 parties agree that issue is not performing at  
5 this time.

6                   Thus, I'm not deciding whether the  
7 post-petition payment lack consideration as local  
8 rules require full representation once an  
9 attorney appears in the case, as Mr. Russell did  
10 when he filed this case.

11                  Whether the obligation of Ms. Ryan to  
12 pay Mr. Russell is really a pre-bankruptcy  
13 agreement subject to discharge, or any other  
14 issue regarding enforceability of the agreement.

15                  These issues can be raised by Ms. Ryan  
16 should she chose to do so and can be dealt with  
17 at that time.

18                  Further, I'm not considering the effect  
19 of Mr. Russell's personal Chapter 13 bankruptcy  
20 case, which is pending before me, and the effect  
21 of that case on the agreement he entered into  
22 with Fresh Start Funding without court approval  
23 after he filed bankruptcy in 2017.

24                  The only issues before me are whether  
25 Mr. Russell's fees should be disgorged or

1 disallowed in their entirety or reduced as  
2 excessive.

3 That is also one of the principal  
4 reasons why I'm not doing a written opinion --  
5 because this -- I don't want it floating around  
6 as some kind of pronouncement that would have any  
7 effect other than this case.

8 I. Mr. Russell's fees are excessive  
9 under Section 329(b) of the Bankruptcy Code. The  
10 U.S. Trustee argues the court should cancel the  
11 pre-petition and post-petition agreements between  
12 Mr. Russell and Ms. Ryan under Section 329(b)  
13 because the agreements were not in Ms. Ryan's  
14 best interest.

15 Mr. Russell's compensation is  
16 excessive, and his disclosures under 329(a) were  
17 inadequate. That Docket No. 30 -- and these are  
18 their arguments -- Docket No. 30 at 98, Docket  
19 No. 53 at 19.

20 Section 329 provides (a) any attorney  
21 representing a debtor in a case under this title,  
22 or in connection with such a case, whether or not  
23 such attorney applies for compensation under this  
24 title, shall file with the court a statement of  
25 the compensation paid or agreed to be paid, if

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1 such payment or agreement was made after one year  
2 before the date of the filing of the petition,  
3 for services rendered or to be rendered in  
4 contemplation of or in connection with the case  
5 by such attorney, and the source of such  
6 compensation.

7 (b) If such compensation exceeds the  
8 reasonable value of any such services, the court  
9 may cancel such agreement, or order the return of  
10 any such payment, to the extent excessive.

11 Most courts have declined the whole  
12 bifurcated fee agreements per se impermissible.

13 See for example *in re Carr*, 613 B.R.  
14 427 at 441 to 442. The Bankruptcy Eastern  
15 District of Kentucky, 2020.

16 Here, the U.S. Trustee cites recent  
17 case law from other Bankruptcy Courts considering  
18 the propriety of such arrangements including *in*  
19 *re Milner*, 612 B.R. 415, Bankruptcy Western  
20 District of Oklahoma, 2019.

21 *In re Wright*, 591 B.R. 68, Bankruptcy  
22 Northern District of Oklahoma, 2018. And *in re*  
23 *Hazlett*, Number 16-30360, 2019 Westlaw 1567751,  
24 Bankruptcy District Utah, April 10, 2019.

25 The U.S. Trustee argues this case

1 provide an analytical framework for evaluating  
2 the reasonableness of bifurcated -- the  
3 agreements. Under these approaches, I should  
4 cancel Mr. Russell's fee arrangements. That's  
5 Docket number 30 at 100.

6 The U.S. Trustee cites the following  
7 for "prime directive" announced in Hazlett for  
8 considering the propriety of any particular  
9 bifurcated agreement.

10 1. And this is a quote -- "other than  
11 deciding whether to represent a debtor, all  
12 dealings, and decisions, including the offered  
13 methods of payment must be based on the client's  
14 best interest, and that the lawyers financial  
15 interest.

16 2. All fees for legal services,  
17 including any finance charge and installment  
18 payments must be reasonable and necessary.

19 3. All fee arrangements must be fully  
20 revealed in the statement of compensation which  
21 must be filed within 14 days of the petition.

22 4. The client elects to proceed pro se  
23 or to retain the services of another lawyer. The  
24 filing attorney must immediately comply with  
25 local rule regarding the substitution or withdraw

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1 of counsel." That's Hazlett 2019, Westlaw  
2 1567751 at pages 9 through 10. See also Milner  
3 612 B.R. at 432 to 33.

4 Further, the Hazlett Court stated that  
5 "fees for post-petition services should not be  
6 directly or surreptitiously slipped into the fee  
7 charged for post-petition services." Hazlett at  
8 page 9.

9 In Hazlett, the Court granted some  
10 rejudgement in favor of the debtor's attorney.  
11 That's on page 14.

12 The U.S. Trustee also cites two  
13 additional concerns and in discussion of the Ryan  
14 case including:

15 1. The attorney's failure to list in  
16 the disclosure of compensation all aspects of the  
17 fee splitting arrangement.

18 2. Clients who use the zero money down  
19 option with fees factored ended up paying 25  
20 percent more than those who paid the retainer up  
21 front.

22 3. The improper shifting of most, if  
23 not all the fees, to the post-petition fee  
24 arrangement, or a conflict of interest in both  
25 creating a non-dischargeable debt for the use of

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1 a post-petition fee agreement, and a conflict  
2 arising from the attorney's desire to maintain a  
3 favorable relationship with the factoring entity  
4 while representing the client. Hazlett at 11 and  
5 12 discussing Wright 590 B.R. 89 through 99.

6 The Hazlett decision involved a  
7 factoring company with debtors counsel signing  
8 the right to collect the attorney's fees and cost  
9 in exchange for an immediate receipt of 75  
10 percent of the total amount from the factoring  
11 company. Hazlett at 11.

12 Here, on the other hand, Fresh Start  
13 Funding's approach involves the extension of a  
14 line of credit to Mr. Russell, as opposed to the  
15 strict assignment of Mr. Russell's right to  
16 collect fees from Ms. Ryan. Docket Number 30 at  
17 101.

18 The Bankruptcy Court for the Western  
19 District of Oklahoma recently considered Fresh  
20 Start Funding's specific business model in the  
21 Milner case. The U.S. Trustee argues that the  
22 facts in the Milner case track closely with the  
23 facts in Ms. Ryan's case. Docket number 30 at  
24 101.

25 In Milner, the debtor's attorney

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1 entered into a line of credit with Fresh Start  
2 Funding. That's Milner at 422.

3 The terms in the line of credit  
4 agreement in Milner appear to be substantially  
5 similar to, or the same, as the terms in this  
6 case. Milner at 422 to 23.

7 The debtor's attorney then entered into  
8 pre-petition and post-petition agreements with  
9 the debtor. Milner at 423 to 26.

10 The debtor paid \$300 in attorney's  
11 fees. And the \$335 case filing fee prior to the  
12 filing of her bankruptcy petition. Milner at 424  
13 to 425.

14 In Milner, the debtor's attorney  
15 entered into a post-petition agreement the day  
16 after the bankruptcy was filed that required the  
17 debtor to pay \$2400 for post-petition services.  
18 Milner at 425 to 26.

19 The Milner Court voided the pre-  
20 petition and post-petition agreements and ordered  
21 the debtor's attorney and Fresh Start Funding to  
22 have no further contact with the debtor. That's  
23 Milner at 443 to 44.

24 The U.S. Trustee argues that chief  
25 among the Milner's -- Court's concerns were the

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1 following:

2                   1. It was not in the debtor's best  
3 interest to enter into the bifurcated fee  
4 agreement because the debtor could not afford to  
5 make the payments to Fresh Start Funding.

6                   2. The debtor -- debtor's attorney's  
7 disclosures under Rule 2016(b) were inadequate.

8                   3. The debtor's attorney charged 50 to  
9 80 percent more than he did in cases that did not  
10 involve bifurcation.

11                  4. The pre-petition and post-petition  
12 agreements violated Section 528 of the Bankruptcy  
13 Code. See Milner at 433 to 443.

14                  Holding that the bifurcated agreements  
15 in Milner did not satisfy the standards set by  
16 Hazlett.

17                  The U.S. Trustee argues that the Milner  
18 case exemplifies the most recent decision to  
19 consider bifurcated fee structures. That's  
20 Docket number 30 at 102.

21                  Further, the U.S. Trustee contends that  
22 Milner dealt with facts that are most similar to  
23 the facts in Ms. Ryan's case. Docket number 30  
24 at 102.

25                  Therefore, the U.S. Trustee concludes

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1 that this Court should reach the same result as  
2 the Milner Court for the same reasons. Docket  
3 number 30 at 102.

4 Counsel for Mr. Russell indicates that  
5 Milner is under appeal. That's Docket number 34  
6 at 1.

7 A. The U.S. Trustee's best interest  
8 analysis fails to show that the retainer  
9 agreement should be cancelled. The U.S. Trustee  
10 argues Mr. Russell's agreements with Ms. Ryan  
11 were not in Ms. Ryan's best interest. Docket  
12 number 30 at 102. Docket number 53 at 19.

13 The U.S. Trustee contends that, as in  
14 Milner, Ms. Ryan's means are very limited.  
15 Docket number 30 at 102. Docket number 53 at 19.

16 In support, the U.S. Trustee points to  
17 the fact that Ms. Ryan is 73 years old, retired,  
18 and her income currently consists entirely of  
19 Social Security benefits of \$1679 per month.  
20 Docket number 53 at 19.

21 Further, Ms. Ryan's total gross annual  
22 income is less than \$20,000.

23 U.S. Trustee argues that even more  
24 egregious is the fact that Ms. Ryan's schedule in  
25 that income was negative when Mr. Russell filled

1 her case. Docket number 53 at 19.

2                   Further, the U.S. Trustee maintains  
3 that the only reason Ms. Ryan can afford to make  
4 the payments to Fresh Start Funding is that she  
5 is living with a friend who does not charge her  
6 rent. Docket number 53 at 19 to 20.

7                   While this is true, her rent would have  
8 been nearly 80 percent of her income. \$1340 in  
9 rent over \$1679 in monthly income at the time of  
10 her deposition. Clearly, she needed to reduce  
11 her rent regardless of the \$100 monthly  
12 obligation to Mr. Russell.

13                  She also clearly stated that if she  
14 started renting again, she could afford rent and  
15 the \$100 payment as the Ryan deposition  
16 transcript 100 -- page 112, 1 through 24. No  
17 contrary evidence was produced by the U.S.  
18 Trustee.

19                  The U.S. Trustee further argues that  
20 the value of Ms. Ryan's discharge remains  
21 questionable. Docket number 30 at 103. Docket  
22 number 53 at 20 to 21.

23                  In support of this argument, the U.S.  
24 Trustee notes that Ms. Ryan listed \$3200 in  
25 assets that are except from collection under

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1 state law. With the exception of \$200 in Ms.  
2 Ryan's checking account. That's stipulation  
3 paragraph 21. See Minnesota Statute 550.37 subd.  
4 4(a) through (b).

5 Further, a majority of Ms. Ryan's debt  
6 -- educational loan -- was not discharged in her  
7 bankruptcy. See 11 USC Section 523 (a)(8).

8 Nevertheless, Ms. Ryan had roughly  
9 \$22,277 in debt that has been discharged. That's  
10 Ryan deposition transcript page -- transcript  
11 pages 94 line 25 to 95 line 3.

12 Thus, there was significant debt to be  
13 discharged. The U.S. Trustee also argues that  
14 Ms. Ryan's earnings and Social Security Benefits  
15 are also exempt from garnishment because she was  
16 earning less than the federal minimum wage. See  
17 42 USC Section 407(a). Minnesota Statute  
18 571.922(a).

19 However, these were only except if an  
20 exemption form for Minnesota Statute Section  
21 571.922 is filled out by a debtor when garnished,  
22 which can be difficult, burdensome, and stressful  
23 for a debtor.

24 Further, dealing with creditors can be  
25 very difficult. See Russell deposition

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1 transcript page 133, line 11 to 134, line 8.

2                   The U.S. Trustee maintains there was  
3 little, if any, evidence on the record that Mr.  
4 Russell explained to Ms. Ryan how little  
5 practical relief bankruptcy could afford her.  
6 Docket number 53 at 20.

7                   For example, the U.S. Trustee argues,  
8 there's no evidence that Mr. Russell explained to  
9 Ms. Ryan that bankruptcy would not excuse her  
10 from paying rent or -- it would not enable her to  
11 keep her car without making her car payments.  
12 Docket number 53 at 20.

13                   And according to U.S. Trustee, there is  
14 little, if any, evidence that Mr. Russell  
15 explained that even without bankruptcy, Ms.  
16 Ryan's creditors could not attach her assets or  
17 garnish her wages. Docket number 53 at 20.

18                   However, Ms. Ryan testified that Mr.  
19 Russell told her Social Security benefits and  
20 income could not be garnished. That's the Ryan  
21 deposition 95, lines 9 to 3.

22                   And as previously discussed, Ms. Ryan  
23 will need to file exemption forms which many  
24 debtors fail to complete. The U.S. Trustee  
25 concludes that Mr. Russell advised his client to

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1       incur purportedly non-dischargeable obligation to  
2       pay \$2335 in order to get a discharge of  
3       questionable value. Docket number 53 at 20 to  
4       21.

5               Yet Ms. Ryan did testify that her debts  
6       were causing stress and her stress has now been  
7       relieved.

8               The U.S. Trustee also maintains that  
9       Mr. Russell did not appear to have made any  
10       serious attempt to advise Ms. Ryan of these  
11       facts. And he stated that he does not assist  
12       clients in negotiating with creditors. Docket  
13       number 53 at 21.

14               Mr. Russell also failed to advise Ms.  
15       Ryan that she could seek pro-bono assistance in  
16       filing her case or that she could seek a waiver  
17       of the Chapter 7 filing fee despite his knowledge  
18       that Ms. Ryan could not afford to pay even the  
19       bankruptcy filing fee before her case was filed.  
20       That's Ryan deposition transcript 99, lines 18  
21       through 25. Russell deposition transcript 117,  
22       line 2 to 118, line 1.

23               The U.S. Trustee argues that Ms. Ryan  
24       was desperate. She relied on Mr. Russell's  
25       judgement as an attorney and she was not properly

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1 advised as to all her options. Docket number 53  
2 at 21.

3 While it is true that he could have  
4 recommended pro-bono assistance, the U.S. Trustee  
5 offered no evidence on her qualifications for  
6 pro-bono assistance by providers.

7 Mr. Russell testified that filing  
8 through a pro-bono provider can take some time as  
9 he has taken pro-bono cases. Russell deposition  
10 transcript 117, line 20 to 118, line 1; and 180,  
11 lines 18 through 25.

12 According to the U.S. Trustee, Mr.  
13 Russell also failed to minimally advise Ms. Ryan  
14 that there were, at a minimum, serious issues as  
15 to whether Mr. Russell had a significant conflict  
16 of interest and was putting his own and Fresh  
17 Start's interest above his clients. Docket  
18 number 53 at 21.

19 The U.S. Trustee further maintains that  
20 Mr. Russell did not advise Ms. Ryan that there  
21 were significant arguments that the entire fee  
22 was dischargeable because it was really agreed to  
23 pre-petition and was merely formalized post-  
24 petition in an attempt to attempt the discharging  
25 junction. Docket number 53 at 21.

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1                   The U.S. Trustee notes that Mr. Russell  
2 and Fresh Start Funding's agreements with Ms.  
3 Ryan committed her to pay -- to payments of \$100  
4 per month for almost two years. Russell  
5 deposition Exhibit 5 at page 73.

6                   This was \$500 more than Mr. Russell's  
7 standard fee. Russell deposition transcript 30,  
8 lines 4 through 12. 147, lines -- line 19  
9 through 148, line 5.

10                  U.S. Trustee argues that Ms. Ryan  
11 cannot afford the payments and all of virtually -  
12 - all of her assets and income were exempt from  
13 collection efforts. Docket number 30 at 103.

14                  Further, a vast majority of Ms. Ryan's  
15 debt was not discharged in new bankruptcy. See  
16 stipulation paragraph 21.

17                  According to the U.S. Trustee, it is  
18 solely the grace of a friend that allows Ms. Ryan  
19 to pay Fresh Start Funding at all. However, Ms.  
20 Ryan testified that if needed, she could pay for  
21 rent and \$100 per month under the fee agreement.  
22 Ryan deposition transcript 112, 1 through 24.

23                  The U.S. Trustee maintains that like  
24 Milner, it was not in Ms. Ryan's best interest  
25 entering into the agreements with Mr. Russell.

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1 And the agreement should be cancelled under  
2 Section 329(b).

3 Further, the U.S. Trustee argues that  
4 unlike Milner, there was no compelling exigency  
5 that required Ms. Ryan to file her bankruptcy  
6 case. Docket number 53 at 22.

7 The U.S. Trustee also contends that  
8 utilizing the asset approach does not yield  
9 different results because Hazlett also requires  
10 consideration of the debtor's best interest.

11 Therefore, the U.S. Trustee concludes  
12 this Court should cancel the agreements.

13 In this case, Ms. Ryan felt financial  
14 stress and had debts. And she had experience  
15 from her prior bankruptcy in 2001 -- 2009, excuse  
16 me.

17 Despite she knew most of her debt was a  
18 student loan that wouldn't be discharged, Ms.  
19 Ryan went to file a Chapter 7 case to lessen her  
20 financial burden and stress by discharging  
21 \$22,277 in debt.

22 Ms. Ryan testified that this stress is  
23 much less since she was able to file bankruptcy.

24 Further, as in her prior case, Ms. Ryan  
25 attested that her monthly expenses exceeded her

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1 income, this time by approximately \$600. Despite  
2 this, since her bankruptcy filing, Ms. Ryan has  
3 been able to eliminate her rent by staying with a  
4 friend.

5 When she does move out, she believes  
6 she can afford rent and the \$100 monthly payment  
7 under the fee agreement.

8 At the time of her deposition in May of  
9 2020, she had made the payments in full and on  
10 time. She had debts of \$22,277 that were  
11 discharged and has less stress now.

12 Attorneys are not required to take pro-  
13 bono cases or refer to pro-bono providers. If  
14 that were the legal standard, numerous cases in  
15 this district, and nationally, would have to be  
16 reevaluated.

17 Further, such pro-bono services are not  
18 unlimited. There's no evidence as to whether Ms.  
19 Ryan would even qualify for pro-bono assistance  
20 or what kind. There is evidence for Mr. Russell  
21 that a pro-bono case can take a while. I will  
22 not require attorneys to explore pro-bono actions  
23 in -- prior to filing bankruptcy unless they  
24 still choose to take the case pro-bono.

25 The conflicts the U.S. Trustee

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1 discusses exist in many cases. And Ms. Ryan was  
2 given the option to confer with another attorney.  
3 Mr. Russell acted as most attorneys would in this  
4 case by taking whatever legal action for the  
5 bankruptcy that was being asked of him.

6 Attorneys have an interest in  
7 completing legal actions requested. There's no  
8 evidence that Mr. Russell pushed Ms. Ryan into  
9 bankruptcy to get paid.

10 Ms. Ryan is intelligent, understood the  
11 process as she's filed bankruptcy before, felt  
12 stress and she wanted to file bankruptcy. I will  
13 not hold that Ms. Ryan cannot file for bankruptcy  
14 and the attorney must take case pro-bono.

15 Even if her assets were all exempt from  
16 collection -- what we call collection proof --  
17 she still would be required to complete paperwork  
18 to stop collection activity and deal with her  
19 creditors, which as Mr. Russell testified can be  
20 complicated and cause stress.

21 Mr. Russell believed that the fee is a  
22 post-petition obligation and not a discharge.  
23 The U.S. Trustee did not show that he had an  
24 obligation to tell his client he could be wrong  
25 in this conclusion.

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1                   However, as part of this decision, Mr.  
2 Russell must show Ms. Ryan the order -- which  
3 will be entered later today -- which clearly  
4 states that this issue has not been decided and  
5 might be available to her.

6                   Therefore, the U.S. Trustee's best  
7 interest analysis fails to demonstrate the  
8 retainer agreement should be completely cancelled  
9 under Section 329(b) -- B.

10                  Mr. Russell's inaccurate 2016 lead  
11 disclosures do not warrant disgorgement of fees.

12                  The evidence is clear that the errors  
13 in the disclosures were unintentional. Section  
14 329(a) of the Bankruptcy Code requires an  
15 attorney for the debtor to file -- "file with the  
16 Court a statement of the compensation paid or  
17 agreed to be paid for services rendered or to be  
18 rendered and the source of such compensation."

19                  Rule 2016(b) requires the statement for  
20 Section 329 to include, "whether the attorney has  
21 shared or agreed to share the compensation with  
22 any other entity. The statement shall include  
23 the particulars of any sharing or agreement -- to  
24 share by the attorney."

25                  Local rule 1006-1 states "the statement

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1 of compensation shall conform substantially to  
2 local form 1007-1."

3 Schroeder v. Rouse (In re Redding), 263  
4 B.R. 874 at 878 8th Circuit Bankruptcy Appeal  
5 Panel 2001. The 8th Circuit B.A.P. recognize,  
6 "when an attorney files a bankruptcy case on  
7 behalf of a debtor, Section 329 requires the  
8 attorney to submit a specific statement of the  
9 compensation paid or agreed to be paid for the  
10 services already rendered or to be rendered."

11 Excuse me.

24 Redding, 263 B.R. 878.

25 The Bankruptcy Court has the broad

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1 power and discretion to award or deny fees.  
2 That's from Karsch v. LaBarge -- B-A-R-G-E -- in  
3 re Clark, 223 F.3d 859 and 863 (8th Circuit  
4 2000). "And it's well settled that disgorgement  
5 of fees as appropriate -- is an appropriate  
6 sanction for failure to comply with the  
7 disclosure requirements of Section 328 and Rule  
8 216."

9 Redding 263 B.R. 880 affirming  
10 disgorgement based on failure to disclose.  
11 "Negligent or inadvertent admissions -- quote --  
12 do not vitiate the failure to disclose."

13 Jensen v. United States Treasury, I  
14 believe, in re Smitty's Truck Stop, 210 B.R. 844,  
15 848 (10th Circuit B.A.P. 1997). Quoting Neben &  
16 Starrett v. Chartwell Financial Corporation in re  
17 Park-Helena -- H-E -- or Helena -- H-E-L-E-N-A --  
18 Corp. 6 -- 63 F.3d 877 and 881 (9th Circuit  
19 1995).

20 See also in re Frye -- F-R-Y-E -- 570  
21 B.R. 21, 27-28 (Bankruptcy District of Vermont  
22 2017) stating that an inadvertent failure to  
23 disclose -- failure to disclose is grounds for  
24 disgorgement.

25 In re Gorski, 519 B.R. 67, 73

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1 (Bankruptcy Southern District of New York 2014,  
2 "anything less than full disclosure leaves  
3 counsel exposed to the possibility entire fee may  
4 be denied."

5 On the other hand, Courts have  
6 discretion to determine whether inaccuracies in  
7 the statement of compensation wherein --  
8 inadvertent drafting errors that necessitate no  
9 sanctions.

10 See *in re Bulen* -- B-U-L-E-N -- 375  
11 B.R. 858 and 862 to 63 (Bankruptcy District of  
12 Minnesota 2007). Foregoing sanctions where the  
13 attorney made inadvertent drafting errors and  
14 cooperated in response to inquiries.

15 See also *in re Parklex Associates Inc.*  
16 435 B.R. 195 and 207 (Bankruptcy Southern  
17 District of New York 2010).

18 Quoting *Vergos v Mendes and Gonzales*  
19 PLLC. That's *in re McCrary* -- M-C-C-R-A-R-Y --  
20 and Dunlap Construction Company LLC 79 Federal  
21 Appendix 77 -- 770 at 779 (6th Circuit 2003)  
22 recognizing that non-compliance with the  
23 disclosure requirements can be "inadvertent  
24 technical violations which may cause for the  
25 imposition of no sanction whatsoever."

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1                   In re Gage, 394 B.R. 184 at 191  
2 (Bankruptcy Northern District of Illinois 2008).  
3        "The determination whether the inaccuracies in  
4        the 20 -- Rule 2016 statement are purposeful  
5        failure to disclose or merely amount to  
6        scrivener's error is clearly within the purview  
7        of the Court."

8                   Here the U.S. Trustee cites Milner to  
9        support his argument that the Court should cancel  
10       Mr. Russell's agreements with Ms. Ryan because  
11       his Rule 2016(b) disclosures were not accurate.  
12       Docket number 30 at 104.

13                  In Milner, the Court took issue with  
14        the initial disclosure filled by the attorney for  
15        the debtor that stated he "agreed to accept \$3035  
16       while the amended disclosure stated the debtor  
17       has agreed to pay \$3035".

18                  Milner, 612 B.R. at 435. The Milner  
19        Court found that the disclosure to be misleading  
20       because the debtor's attorney was not receiving  
21       \$3035, instead he was receiving \$2435 and Fresh  
22       Start Funding was receiving \$600.

23                  Here, Mr. Russell's disclosure states  
24        "for legal service, debtor has agreed to pay  
25       \$2000." Russell deposition Exhibit 2 at Part 49,

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1 Docket number 16 at 1.

2                   Based on these facts, the U.S. Trustee  
3 knows that Mr. Russell was not in fact receiving  
4 the full amount of the fee. Docket number 30 at  
5 105.

6                   However, the Trustee recognizes that  
7 Mr. Russell did not make the similar disclosure  
8 error, as in Milner, regarding how much Mr.  
9 Russell would accept for the representation  
10 assuming that's relevant. Docket number 30 at  
11 105.

12                  But Mr. Russell did disclose that a  
13 lender would take Ms. Ryan's obligation as  
14 collateral and the lender would manage Mr.  
15 Russell's receivable, which give -- clearly gives  
16 notice that the lender would be paid by Ms. Ryan.

17                  And in fact when I said she's been  
18 paying Fresh Start Funding, that's just a fact.  
19 She's paying them as -- at least as the manager  
20 of Mr. Russell's receivable.

21                  The U.S. Trustee next argues that Mr.  
22 Russell inaccurately disclosed the source of  
23 compensation as Ms. Ryan. Docket number 30 at  
24 105. Docket number 55 at 25 to 26.

25                  The U.S. Trustee contends that Fresh

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1 Start Funding's line of credit is the source of  
2 compensation. And according to the U.S. Trustee,  
3 Mr. Russell's disclosures fail to make clear that  
4 Mr. Russell received his compensation by  
5 borrowing money from Fresh Start Funding. Docket  
6 number 30 at 105. Docket number 53 at 25 to 26.

7 The U.S. Trustee further maintains that  
8 Ms. Ryan has not paid Mr. Russell in connection  
9 with his representation in the case, but she pays  
10 Fresh Start Funding and Fresh Start Funding has  
11 paid Mr. Russell. Docket number 53 at 25.

12 Nevertheless, the U.S. Trustee also  
13 recognizes that Fresh Start Funding's approach  
14 involves the extension of a line of credit to Mr.  
15 Russell. Docket number 30 at 101.

16 Further, I note that Ms. Ryan's  
17 payments were only pledged for security for the  
18 debt of Mr. Russell. Fresh Start Funding's fee  
19 for the financing, payment management services,  
20 credit reporting, et cetera, is calculated as a  
21 percentage of the value of the assets securing  
22 the line of credit. The amount of the total  
23 post-petition fee receivable in each Chapter 7  
24 case, which counsel pledges to Fresh Start  
25 Funding to be able to make draws against the line

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1 of credit.

2 Ms. Ryan is the source of the payment.

3 If Ms. Ryan did not pay, Mr. Russell was liable  
4 with Fresh Start Funding for any unpaid amounts.

5 Therefore, I found the disclosures accurate  
6 enough because Mr. Russell did disclose the line  
7 of credit and the management of the receivable  
8 allowing proper inquiry into the complex  
9 arrangement.

10 U.S. Trustee also points to Mr.  
11 Russell's inaccurate disclosure that he agreed to  
12 represent Ms. Ryan in contested matters. Docket  
13 number 30 at 105. Docket number 53 at 26.

14 U.S. Trustee notes that the disclosure  
15 directly conflicts with the fee agreements and  
16 notice of responsibilities. Docket number 53 at  
17 26.

18 Nevertheless, there is nothing to show  
19 anything more than a mistake rather than an  
20 intentional deception. It appears that Mr.  
21 Russell understood he would have to represent Ms.  
22 Ryan in contested matters as required in the --  
23 in this disclosure.

24 And, in fact, Mr. Russell did so in Ms.  
25 Ryan's previous case, and other client's cases.

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1 And she knew he represented her in that motion to  
2 dismiss -- contested motion to dismiss in  
3 previous case without charging extra.

4 Further, I certainly would have  
5 required Mr. Russell to represent Ms. Ryan in all  
6 contested matters. See Local Rule 1007-3-1,  
7 9010-3(g), Local Form 1007-3-1(7).

8 The U.S. Trustee argues that like  
9 Milner, Mr. Russell represented in his  
10 disclosures that he did not agree to share his  
11 compensation with any other person other than  
12 members or associates of his firm. Docket number  
13 30 at 106.

14 The U.S. Trustee contends that the  
15 disclosure failed to acknowledge that Ms. Ryan  
16 pays fees to Fresh Start Funding which then  
17 shares the fees with Mr. Russell. Docket number  
18 53 at 27.

19 Thus, the U.S. Trustee maintains that  
20 Mr. Russell is sharing compensation with Fresh  
21 Start Funding and is questionable at best that  
22 Ms. Ryan was aware that Fresh Start Funding was  
23 retaining 25 percent of her total payment  
24 payments under a fee arrangement. Docket number  
25 30 at 106.

1                    Nevertheless, as previously discussed,  
2 Fresh Start Funding provides a recourse line of  
3 credit, the repayment of which is secured by  
4 collateral assignment of counsel's fee  
5 receivables. And the repayment of that debt is  
6 due from Russell. Whether his clients pay or  
7 not, Mr. Russell received a loan by -- from Fresh  
8 Start Funding.

9                    Mr. Russell must repay the line of  
10 credit regardless of what he eventually receives  
11 in fees from Ms. Ryan. And the amounts paid to  
12 Fresh Start Funding are not contingent on Mr.  
13 Russell's recovery from Ms. Ryan.

14                   Mr. Russell disclosed the financing  
15 arrangement, disclosed the line of credit with a  
16 letter -- lender. There is no evidence of an  
17 intent to deceive by Mr. Russell in this  
18 statement as it disclosed the lender line of  
19 credit and receivable management.

20                   And Mr. Russell still maintains he is  
21 not sharing compensation. Russell deposition  
22 transcript page 69, lines 2 through 14. 170,  
23 line 10 through 171, line 6.

24                   Even though the agreement could be  
25 recharacterized as an assignment of the

1 receivable, under the agreement as written, the  
2 receivable is not assigned. Mr. Russell is not  
3 required to recharacterize the agreements as an  
4 assignment. The important thing is to disclose  
5 the arrangements, which he did.

6 U.S. Trustee next points to the  
7 inaccurate disclosure that Ms. Ryan will only  
8 make 12 monthly payments rather than the actual  
9 number of payments which is roughly 23 payments  
10 of \$100, and a single payment of \$35. Docket  
11 number 30 at 106. Docket number 53 at 28.

12 This is clearly a mistake and was not  
13 an intentional deception. There was no evidence  
14 to the contrary. Ms. Ryan clearly understood she  
15 had to make 24 payments; thus the mistake does  
16 not rise to a level necessitating disgorgement.

17 The U.S. Trustee argues that Mr.  
18 Russell's agreements with Ms. Ryan repeat the  
19 same practice that drew the Milner court's ire.  
20 That being a failure to disclose the claim in the  
21 agreements that the bifurcated agreement causes  
22 Mr. Russell to charge an additional \$500. Docket  
23 number 30 at 106.

24 Even such a disclosure is required, I  
25 find that Mr. Russell did not engage in

1       intentional deception that necessitates  
2       disgorgement in this case.

3               Further, Ms. Ryan clearly understood  
4       she was obligated to pay an extra \$500 by  
5       choosing to have her legal services for the case  
6       split into two contracts. Ryan deposition  
7       transcript 28, lines 9 through 13.

8               The U.S. Trustee next takes issue with  
9       Mr. Russell's initial disclosure that simply left  
10      amounts blank. Docket number 30 at 106.

11              This error was corrected and was  
12      clearly a mistake by Mr. Russell. Not  
13      intentional deception.

14              The U.S. Trustee also contends that,  
15      like Milner, Mr. Russell's disclosures are  
16      confusing and less than complete. Docket number  
17      30 at 107. See Milner, 612 B.R. 436.

18              Further, the U.S. Trustee argues that  
19      there are gaps in the disclosure that would  
20      likely lead to the same result if analyzed under  
21      the rubric discussed in Hazlett 2019 Westlaw  
22      1567751 at page 10 including that, "all fee  
23      arrangements must be fully disclosed in the form  
24      B 2030, disclosure of compensation, which must be  
25      filed within 14 days of the petition." That's

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1 Docket number 30 at 107.

2                   Here, Mr. Russell's disclosures  
3 sufficiently revealed a fee arrangement.  
4 Further, Local Rule Local Form 1007-1(a) states,  
5 "statement of compensation shall conform  
6 substantially to Local Form 1007-1."

7                   In this case, Mr. Russell's fee  
8 disclosure substantially conform to the Local  
9 Form. See Russell deposition Exhibit 2 at pages  
10 49 through 50. Docket number 16, Local Form  
11 1007-1.

12                   His disclosures also added paragraphs  
13 beyond the Local Form, and the added paragraph  
14 describe the fee arrangements or highlighted the  
15 contained amounts that were not filled out. See  
16 Russell deposition Exhibit 2 at 49 through 50.  
17 Docket number 16, Local Form 1007-1.

18                   In review of the disclosures, the  
19 arrangement caught the Court's attention to  
20 further examine the fee arrangement. See Federal  
21 Rule of Bankruptcy Procedure 20 -- 2017(b)

22                   Further, Mr. Russell complied with  
23 inquiries to supplement the record for me to  
24 determine reasonable compensation under Section  
25 329(b).

1                   The U.S. Trustee's last argument is Mr.  
2 Russell's disclosure failed to provide an  
3 accurate and reasonably complete account of his  
4 arrangement with Fresh Start Funding. Docket  
5 number 53 at 28 to 29.

6                   Further, the U.S. Trustee contends that  
7 errors in the initial disclosure suggest that Mr.  
8 Russell may not even have reviewed the original  
9 disclosure. Docket number 53, 29.

10                  But as previously discussed, while the  
11 disclosures should have been better, Mr.  
12 Russell's disclosures contain sufficient  
13 information as errors were correctable mistakes,  
14 not intentional deception.

15                  In Milner, the Court voided the  
16 retainer agreements, but nevertheless, allowed  
17 attorney's fees in what I assume to be to be the  
18 amount of \$1900. See 16 -- see 612 423 to 24,  
19 26, 443 to 44. Ordering one final payment of  
20 \$200 in December for payments that started in May  
21 and included \$300 in fees that were paid pre-  
22 petition.

23                  The Milner Court allowed those fees  
24 giving the debtor "had a satisfactory income" --  
25 excuse me -- "outcome in her bankruptcy case."

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1 Page 443 -- 4-4-3.

2                   In its reasoning for the order, the  
3 Court stated that its "sole concern is the  
4 mechanism counsel selected for payments of his  
5 attorney's fees. Such mechanism with  
6 insufficient disclosures and confusing contracts  
7 resulted in a significant upcharge in the form of  
8 post-petition debt being incurred by a  
9 financially challenged, distress and unfit --  
10 unsophisticated debtor." That's page 443, note --  
11 footnote 32.

12                   Here I find the disclosures in this  
13 case are distinguishable from Milner. In this  
14 case, Ms. Ryan testified she understood the fee  
15 arrangement. Further, there's no evidence before  
16 me that she's an unsophisticated debtor who was  
17 confused by the retainer agreements or  
18 disclosures. To the contrary, she appears to  
19 have a good understanding of the agreements and  
20 is quite intelligent.

21                   But even if I voided the agreements, I  
22 would still allow \$1285.50 in fees -- to be  
23 discussed in a minute here -- since there was a  
24 satisfactory result for the work performed, just  
25 as in Milner.

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1                   Therefore, Mr. Russell's taking the  
2 compensation meets the requirement under Code and  
3 Rules and does not warrant disgorgement.

4                   C. The amount of Mr. Russell's fees is  
5 unreasonable. Section 329 of the Bankruptcy Code  
6 governs the fee arrangements when the debtor and  
7 the attorney representing the debtor -- that's  
8 Schroeder v. Rouse in re Redding, 247 B.R. 474  
9 and 478, (8th Circuit B.A.P. 2000).

10                  See also Fiegen -- F-I-E-G-E-N -- Law  
11 Firm v. Fokkena -- F-O-K-K-E-N-A -- in re On-Line  
12 Servs. Ltd., 324 B.R. 342 at pages 347-49 (8th  
13 Circuit B.A.P. 2005).

14                  Applying Lamie v. United States, 540  
15 unit -- U.S. 526 (2004).

16                  Section 329(b) provides "if such  
17 compensation exceeds the reasonable value of any  
18 such services, the Court may cancel any such  
19 agreement or order the return of any such payment  
20 to the extent excessive."

21                  "Section 329 requires the attorney to  
22 show the agreed upon compensation for legal  
23 services is reasonable.

24                  Zepecki -- Z-E-P-E-C-K-I -- v. Luker in  
25 re Zepecki, 277 F.3d 1041 at 1046 (8th Circuit

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1 2002). Citing *Snyder v. Dewoskin* -- D-E-W-O-S-K-  
2 I-N -- *in re Mahendra* -- M-A-H-E-N-D-R-A, 131  
3 F.3d 750 at 757 (8th Circuit 1997).

4 See *Clark*, 223 F.3d at 863. "A  
5 disgorgement is only allowed to the extent that  
6 the fees are excessive."

7 *Brown v. Luker in re Zepecki*, 258 B.R.  
8 719 at 725 (8th Circuit B.A.P. 2001).

9 Citing *Redding* 247 B.R. at 478-79.

10 Here, as previously discussed, the U.S.  
11 Trustee's best interest analysis fails to  
12 demonstrate under 329(b) that Mr. Russell should  
13 be required to refund the entire fee to Ms. Ryan.

14 Both parties have decided the lodestar  
15 method as a standard to apply to a determination  
16 of reasonable compensation of a debtor's  
17 attorney. Docket number 30 at 108 and Docket  
18 number 55 at 14.

19 "Section 330 governs the allowance of  
20 attorney's fees and permits the Court on its own  
21 motion or on the motion of a Trustee or other  
22 party in interest to award compensation that is  
23 less the amount requested."

24 *Bachman v. Pelofsky in re Peterson* --  
25 Pelofsky is P-E-L-O-F-S-K-Y -- , 251 B.R. 359 at

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1 363 (8th Circuit B.A.P. 2000), aff'd, 13 F.  
2 Appendix -- A-P-P-'-X -- 491 (8th Circuit 2001).

3 See also American Law Ctr. v. Stanley  
4 in re Jastrem -- J-A-S-T-R-E-M -- 253 F.3d 438 at  
5 443 (9th Circuit 2001). "Section 330 sets out  
6 the standard by which courts should determine the  
7 reasonableness of fees under Section 329."

8 Under 11 U.S.C. Section 330(a)(3),  
9 "Court shall consider the nature, the extent, and  
10 the value of such services, taking into account  
11 all relevant factors."

12 In determining the reasonableness of  
13 fees under 330, the 8th Circuit applies the  
14 lodestar method.

15 Chamberlain v. Kula in re Kula -- K-U-  
16 L-A --, 213 B.R. 729 at 736 (8th Circuit B.A.P.  
17 1997).

18 Citing P.A. Novelly -- N-O-V-E-L-L-Y --  
19 v. Palans -- P-A-L-A-N-S -- in re Apex Oil.  
20 That's 960 F.2d 728 at 731 (8th Circuit 1992).

21 Under the lodestar method, a Court  
22 multiplies the hours expended by the attorney and  
23 the action by a reasonable hourly rate of  
24 compensation and makes any necessary adjustment  
25 to that figure. Johnston v. Comerica Mortgage

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1 Corporation, 83 F.3d 241 at 244 (8th Circuit  
2 1996).

3 See also Peterson, 251 B.R. 363 to 364.  
4 "We have consistently held that the lodestar  
5 method calculated by multiplying the reasonable  
6 hourly rate by the reasonable number of hours  
7 required to represent the debtor in the case is  
8 the appropriate approach for determining  
9 reasonable compensation under section 30."

10 I note that the 8th Circuit Bankruptcy  
11 Appellate Panel has recognized there are  
12 circumstances where the lodestar method is  
13 inappropriate for calculating reasonable fees  
14 such as the flat fee -- such as in flat fee  
15 arrangements.

16 In re Kula, 213 B.R. 737 footnote 5,  
17 describing various flat fee arrangements that  
18 have been permitted without application of  
19 lodestar, including a "normal and customary debt-  
20 based formula."

21 Mr. Russell usually charges a flat fee.  
22 A \$1500 to \$1700 for his services, which  
23 according to precedent would not necessarily  
24 require him an analysis utilizing the lodestar  
25 method.

1                   However, since both Courts have  
2 referenced the lodestar method in their arguments  
3 regarding Mr. Russell's fees, I will apply the  
4 lodestar method.

5                   I will not allow Mr. Russell a fee of  
6 \$2000. A fee of \$2000 is \$300 to \$500 more than  
7 Mr. Russell generally charges for his  
8 representations in bankruptcy cases.

9                   It is clear that the additional amount  
10 charged by Mr. Russell as a result of his funding  
11 agreement with Fresh Start Funding which was  
12 entitled 25% of the \$2000 and leaving Mr. Russell  
13 with approximately his normal flat fee.

14                  The additional labor required by Mr.  
15 Russell in this case related to the paperwork for  
16 financing with Fresh Start Funding, his lender,  
17 Ms. Ryan should not be required to pay for the  
18 financing arrangements of Mr. Russell with Fresh  
19 Start Funding.

20                  See Milner 612 B.R. at 440. Finding  
21 the upcharge for the fee arrangement behind the  
22 attorney's customary rate as excessive  
23 compensation.

24                  See also Hazlett, 2019 Westlaw at 12,  
25 recognizing the concern with a client who pays an

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1 upcharge for a bifurcated fee arrangement.

2                   In fact, his -- Ms. Ryan's case is  
3 clearly a relatively simple case with fee assets  
4 or debts and no potential contested matters as  
5 occurred in her 2009 case where he charged  
6 approximately \$1400.

7                   But it makes no sense to charge more  
8 for this simple case than her more complex case  
9 solely because the attorney's financing  
10 arrangements.

11                  To the extent Mr. Russell can charge  
12 \$500 more for this case because of the risk of  
13 Ms. Ryan's failure to pay, he concedes her  
14 payment is not particularly risky. The money is  
15 deducted from the bank automatically and she  
16 receives Social Security.

17                  Further, she paid \$1000 post-petition  
18 in her 2000 case, even though she knew she was  
19 not required to do so.

20                  In any event, Mr. Russell did not  
21 calculate or produce evidence of an appropriate  
22 interest rate. In fact, Mr. Russell was willing  
23 to take this case if Ms. Ryan would pay only the  
24 filing fee pre-petition and then, he would rely  
25 on her moral obligation to pay the rest of the

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1 fee post-petition.

2                   In this case, Mr. Russell estimated he  
3 performed approximately \$1965.50 in services in  
4 Ms. Ryan's case. But that amount included Mr.  
5 Russell's pre-petition services which he has  
6 waived in this case. Without the fees associated  
7 with his pre-petition work, which he waived, it  
8 is estimated that Mr. Russell's -- Mr. Russell  
9 performed approximately \$1285.50 worth of  
10 services in Ms. Ryan's case.

11                   Mr. Russell's uses of a flat fee rate  
12 in this case makes a typical lodestar  
13 multiplication analysis difficult. On the basis  
14 of his estimation of work performed and time  
15 expended in belief that \$250 would be a  
16 reasonable rate for an attorney with his  
17 experience, I find that \$1285.50 is the  
18 reasonable fee amount to be charged in this case.

19                   Just to be clear, that amount is a --  
20 Mr. Russell, on an exhibit to his deposition, it  
21 list what he would -- the tasks that he normally  
22 performs in a Chapter 7 case, pre- and post-  
23 petition. We deduct out the pre-petition which  
24 make -- which is being waved and deduct out  
25 services he never had to perform. And that's how

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1 we get down to the \$1965, and then take out the  
2 pre-petition amount which, I believe, was \$680.  
3 And that's where we get the \$1285.50.

4 Counsel for Mr. Russell concedes this  
5 Court has discretion in determining reasonable  
6 fees under Section 329. And I can take into  
7 account what's a normal fee based on my own  
8 experience.

9 See *Childress v. Fox Associates LLC*,  
10 932 F.3d 1165 at 1172 (8th Circuit 2019). "A  
11 Court has great latitude to determine a  
12 reasonable hour -- a reasonable hourly rate  
13 because it is intimately familiar with its local  
14 bar."

15 Quoting *Michael J Banks v. Slay*, 875  
16 F.3d 876 at 882 (8th Circuit 2017). *Bryant v.*  
17 *Jeffrey Sand Company*, 919 F.3d 520 at 529 (8th  
18 Cir. 2019). "When determining reasonable hourly  
19 rates, the court may rely on their own experience  
20 and knowledge of prevailing markets."

21 Quoting *Hanig v. Lee* -- H-A-N-I-G -- v.  
22 *Lee*, 415 F.3d 822 at 825 (8th Cir. 2005).  
23 Although I -- reluctant to take my own experience  
24 to account, and don't base the decision on my own  
25 experience, I do know that \$2000 is excessive in

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1 this district for a simple case such as this one.

2 Therefore, any amount paid in excess of  
3 \$1285.50 by Ms. Ryan for services rendered by Mr.  
4 Russell must be disgorged and not collected.

5 II. The U.S. Trustee fails to  
6 demonstrate that Mr. Russell's agreements with  
7 Ms. Ryan violate Sections 526 and 528 of the  
8 Bankruptcy Code.

9 Mr. Russell meets the statutory  
10 definition of Bankruptcy Code of a "debt relief  
11 bankruptcy." See 11 USC Section 101(12)(a).

12 As such, he's subject to Sections 526  
13 to 28 of the Bankruptcy Code. Section 526(c)(1)  
14 provides "any contract for bankruptcy assistance  
15 in a debt relief agency and an assisted person  
16 that does not comply with the material  
17 requirements of this section, section 527, or  
18 section 528 shall be void and may not be enforced  
19 by any Federal or State court or by any other  
20 person, other than such assisted person."

21 11 USC Section 526(c)(1). Here the  
22 U.S. Trustee does not cite material requirements  
23 from Section 526 or 527. Rather, the U.S.  
24 Trustee specifically cites Section 528(a)(1),  
25 Docket number 30 at 109, Docket number 53 at 34

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1 through 36.

2                   Section 528(a)(1) states "a debt relief  
3 agency shall --

4                   (1) not later than five days after the  
5 first date on which such agency provides any  
6 bankruptcy assistance services to an assisted  
7 person, but prior to such assisted person's  
8 petition under this title being filed, execute a  
9 written contract with such assisted person that  
10 explains clearly and conspicuously --

11                   (A) the services such agency will  
12 provide to such assisted person; and

13                   (B) the fees or charges for such  
14 services, and the terms of payment. 11 USC  
15 Section 528(a)(1).

16                   The U.S. Trustee again argues what  
17 Milner has instructed. Docket number 30 at 109.

18                   In Milner, the Court noted the length  
19 and density of the pre-petition and post-petition  
20 agreements and criticized the extensive use of  
21 legalese in both documents. Milner, 442 to 443.

22                   For example, the Milner court found  
23 that "confusing legalese included an express  
24 disclaimer of any legal representation with  
25 respect to the pre-petition contract or the post-

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1 petition contract combined with a recommendation  
2 that debtor seek independent legal counsel to  
3 review the contracts." At page 443.

4 Here, the U.S. Trustee argues that Mr.  
5 Russell's agreements with Ms. Ryan suffer from  
6 most of the same defects. Docket number 30 at  
7 109.

8 Further, the U.S. Trustee contends that  
9 it appears that Fresh Start Funding has increased  
10 the lengthy -- has increased the length and  
11 complexity of the agreements that it provides the  
12 bankruptcy attorney. Docket number 30 at 109.

13 Therefore, the U.S. Trustee argues that  
14 the evidence shows that Mr. Russell's agreement  
15 did not explain clearly and conspicuously the  
16 scope of services. Docket number 53 at 34.

17 U.S. Trustee also argues that Mr.  
18 Russell has not read and did not understand the  
19 language regarding potential conflicts. Docket  
20 number 53 and 35.

21 For example, Mr. Russell acknowledge  
22 the language in the agreements he had purported  
23 to exclude purported contested matters from the  
24 scope of representation and was incorrect.

25 That's Russell deposition transcript 138, line 25

1 through 140, line 5.

2 U.S. Trustee next argues that Mr.  
3 Russell admitted to the notion of a separate  
4 attorney reviewing the reasonableness of the  
5 terms in the engagement or of Ms. Ryan obtaining  
6 new counsel post-petition was largely illusory.  
7 Docket number 53 at 35.

8 Further, the U.S. Trustee contends that  
9 Ms. Ryan did not understand that Mr. Russell  
10 would have to keep representing her and her  
11 bankruptcy case even if she declined to hire him  
12 for post-petition services. Docket number 53 at  
13 35.

14 The U.S. Trustee also points to Ms.  
15 Ryan's admission that Ms. Ryan did not see either  
16 of the retainer agreements prior to the day that  
17 Mr. Russell filed her petition. Docket number 53  
18 at 35.

19 And Ms. Ryan did not see the post-  
20 petition agreement until after the filing of the  
21 petition, and apparently, and no more than at  
22 most nine minutes to review it.

23 U.S. Trustee contends that's it is  
24 unlikely that anyone, including a seasoned  
25 bankruptcy attorney, could read through the post-

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1 petition agreement in that amount of time and  
2 emerge with a meaningful understanding of all the  
3 terms contained in the agreement. Docket number  
4 30 at 109 and 110.

5 The U.S. Trustee states there's no  
6 reason to believe that Ms. Ryan understood it  
7 either. Docket number 30 at 110.

8 The U.S. Trustee again relies on Milner  
9 and argues that to compound the complexity of the  
10 post-petition agreement, both agreements included  
11 provisions that required the debtor to  
12 acknowledge that she understood about the various  
13 potential conflicts of interest and the right to  
14 independent counsel and choose to waive that  
15 right in any potential conflicts. Docket number  
16 30 at 110.

17 The U.S. Trustee also argues that the  
18 agreements do not adequately convey the impact of  
19 Fresh Start Funding's involvement in the case.  
20 Docket number 30 at 110.

21 In other words, the U.S. Trustee  
22 maintains that neither agreement communicates  
23 that Fresh Start Funding will retain 25 percent  
24 of the fees paid by Ms. Ryan. Docket number 30  
25 at 110.

1                   And the U.S. Trustee argues that  
2 passage in the agreement is a material  
3 requirement of Section 528(a)(1).

4                   A. Mr. Russell's engagement agreement  
5 meets 528's requirements in this case. Here, Mr.  
6 Russell's fee -- pre-petition agreement explains  
7 "payments and filing actions" in paragraph one  
8 which also disclosed the higher fee if the client  
9 chooses not to prepay for the entire engagement.  
10 Russell deposition Exhibit 5 at 72.

11                  Paragraph 2 identifies all the services  
12 that Mr. Russell will provide pre-petition if the  
13 client choose to split the engagement in order to  
14 make post-petition installment payments of the  
15 attorney's fees. Russell deposition Exhibit 5 at  
16 72.

17                  It further explains in paragraph 4 the  
18 options that Ms. Ryan will have to complete the  
19 case and enumerates exactly what services will be  
20 provided post-petition if the debtor signs a  
21 separate post-petition agreement. Russell  
22 deposition Exhibit 5 at 72 to 73.

23                  This list of services is reiterated in  
24 the post-petition agreement in paragraph 1. See  
25 Russell deposition Exhibit 6 at 79.

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1                   As to payment terms, the pre-petition  
2 agreement explains the maximum payment term and  
3 different options for payment frequency in  
4 paragraph 4(a). Russell deposition Exhibit 5 at  
5 73.

6                   Paragraph one of the post-petition  
7 agreement parallels this exact disclosure.  
8 Russell deposition Exhibit 6 at 79.

9                   In this case, Ms. Ryan's testimony  
10 makes it clear she understood the fundamental --  
11 these fundamental attributes of her engagement of  
12 Mr. Russell. Most importantly, the U.S. Trustee  
13 provided no evidence that Ms. Ryan found it  
14 complex and confusing or was more complex than a  
15 lease, car loan or student load. Documents that  
16 she clearly agreed to in the past and actually  
17 testified she understood the arrangement.

18                   Of course, this only applies to Ms.  
19 Ryan. It's possible, with appropriate evidence,  
20 I would hold that the agreements violate these  
21 provisions in other cases.

22                   Therefore, I find that while the  
23 agreements between Mr. Russell and Ms. Ryan are  
24 lengthy and detailed, the agreements are clear  
25 and conspicuous in their explanation of the exact

1 services that will be provided and the  
2 alternatives that Ms. Ryan was presented for a  
3 pre-paid and bifurcated engagement and the terms  
4 of payment.

5 Further, Mr. Russell explained the  
6 terms of the engagement to Ms. Ryan, including  
7 her options to either prepay the attorney fee or  
8 to pay a higher fee in installments after her  
9 case was filed. And the explanation spanned  
10 almost two weeks -- three in person meetings and  
11 several hours before the case was filed.

12 Therefore, the retainer agreements meet  
13 the narrow statutory requirements in Section 528  
14 in this case.

15 I note that the Milner case, upon which  
16 the U.S. Trustee predicates nearly the entirely  
17 of its arguments is distinguishable from this  
18 case in at least one way.

19 In Milner, the debtor was not available  
20 to testify, leaving the court having to look at  
21 that issue in a virtual vacuum. That's Milner at  
22 433, note 17.

23 Here, in contrast, I need not rely on  
24 the documents or speculate about what the debtor  
25 might or might not have understood. Ms. Ryan has

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1 removed all doubt about whether she gave informed  
2 consent to the bifurcation of her agreement, and  
3 to the higher fee to pay Mr. Russell over time.

4 However, the agreement might in fact be  
5 too confusing or complex for other debtors in  
6 other cases. Again, this decision only applies  
7 to this case.

8 Further, as to the broader issue of  
9 informed consent, consumers like Ms. Ryan are  
10 legally expected to understand and make binding  
11 choices about a host of life issues where the  
12 operative documents were -- are at, at least, in  
13 many instances, much more complicated than  
14 Russell's engagement agreement.

15 Consider for example the disclosures  
16 Congress mandated debtors receive and then  
17 paralegally presume to understand for 11 USC  
18 Section 342(b) Bankruptcy Form 2010.

19 Ms. Ryan assumably has signed complex  
20 student loan lease and car loan documents and in  
21 the past, she had a mortgage in her 2009 case.

22 Those disclosures are easily as  
23 complicated -- or those agreements rather -- are  
24 as easily as complicated or more so than the  
25 engagement agreement here.

1                   And again, that's not evidence in this  
2 case. That's just stating what might be an  
3 assumption.

4                   And while it is certainly true that Mr.  
5 Russell's documents also must satisfy the  
6 requirements of Section 528, those requirements  
7 are actually narrow and simple, and there could  
8 be no reasonable argument that Mr. Russell's  
9 engagement failed to satisfy Section 528 mandate  
10 in this case.

11                  U.S. Trustee next argues the retainer  
12 agreements are difficult to understand when run  
13 in conjunction with a notice of responsibility in  
14 Mr. Russell's 2016 disclosures. Docket number 30  
15 at 110.

16                  In support of the argument, the U.S.  
17 Trustee points to Mr. Russell's rule 2016(b)  
18 disclosures that conflict with the retainer  
19 agreements in the question of how many payments  
20 Ms. Ryan's required to make, and by implication,  
21 the amount of the payments. Docket number 30 at  
22 110.

23                  Further, the U.S. Trustee contends the  
24 retainer agreements also appear to conflict with  
25 the representations about the scope of services

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1 in the notice of responsibilities and in the 2016  
2 disclosures. Docket number 30 at 110.

3 The U.S. Trustee indicates that the  
4 scope of Mr. Russell's services and the payment  
5 schedule for Ms. Ryan also represents material  
6 requirements of 528(a)(1). Docket number 30 at  
7 110.

8 However, the idea that Ms. Ryan would  
9 be confused by counsels B -- 20-- 30 disclosure  
10 is not supported by any evidence. That  
11 disclosure is made to the court, not to the  
12 client. Ms. Ryan already entered into her  
13 engagement before Mr. Russell even filed his  
14 first, and later amended, disclosure with the  
15 court.

16 Further, the minor inconsistencies with  
17 the notice of rights and responsibilities are not  
18 material and should be corrected in future  
19 arrangements.

20 Thus, if there's any confusion about  
21 the scope of services, the whole point of the  
22 notice of rights and responsibilities is to make  
23 sure that it represented -- better understands  
24 what to expect from counsel.

25 Therefore, they -- the U.S. Trustee

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1 fails to show that the retainer agreements are  
2 void under Section 526(c)(1), at least that's --  
3 as in this case.

4 So, the end result here is that Mr.  
5 Russell's fees are reduced to \$1285.50.  
6 assumably -- I don't know this but -- assumably  
7 at \$100 a month, Ms. Ryan has not paid that. We  
8 have to add in the \$335 filing fee. And so, we  
9 get a total of \$1620.50. \$1620.50. Assuming  
10 that's not already been paid. That is the total  
11 amount that Mr. Russell is allowed to receive.

12 And Ms. Ryan is not required to pay  
13 anything more than that. She is not required to  
14 do so.

15 And again, some of the issues -- the  
16 Trustee rates also might go to the enforceability  
17 of the agreement, but that's not before me.

18 For example, was it really a pre-  
19 petition agreement? Did she really decide and  
20 did the parties really decide that this was how  
21 they were going to go prior to the bankruptcy?  
22 And, therefore, an argument that it's -- that  
23 this has been discharged. That the -- I also  
24 note that even if I had ruled and voided the  
25 agreements and found they violated Section 526

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1 and 528, for example, I still would have followed  
2 the Milner decision and allowed fees which would  
3 have been the exact same amount to \$1285.50 based  
4 on the evidence that I had. Just as the Milner  
5 court allowed a larger amount in that case  
6 because of the positive result in the case which  
7 also occurred here.

8 I also note again that although it's  
9 true a number of -- a large number of her debts  
10 are not discharged -- or could be at some point  
11 if she brought a lawsuit on the student loans --  
12 but in any event, could be if -- depending on how  
13 that kind of case go. Whether she could prove  
14 it's an undue hardship, et cetera.

15 Nonetheless, that the \$2200 plus in  
16 fees have been discharged. Her stress has been  
17 relieved. And that \$1285.50 is a reasonable fee  
18 to pay for that result. Plus the \$335 in filing  
19 fee. I also note -- we discussed that the  
20 Trustee argued that she could have filed for a  
21 fee waiver. She could have but if she had the  
22 ability to pay \$100 a month post-petition, I  
23 can't say how I'd rule on something like that.  
24 But one of the things that Congress has us look  
25 at is can they pay it in installments. Even if

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1       they're below the 150 percent of the poverty  
2       level.

3               And so, even if she's below that  
4       amount, the second inquiry, of course, can she  
5       pay in installment? And the evidence I have here  
6       is, based on her deposition, is that yes, she  
7       could.

8               So, in any event, that's the decision .  
9       I want to again emphasize, and you may be  
10      wondering why didn't I put all this in writing  
11      since I was clearly reading it? Why not file it  
12      in that way, you know, and the principal reason  
13      is because I don't want this decision to be  
14      floating around as some kind of pronouncement on  
15      other cases. This is very unique to the -- this  
16      particular case.

17               A decision could be quite different in  
18      another case. It's also important that the  
19      parties did not bring a number of issues agreed.  
20      The number of issues were not before me. And  
21      although I'm not amused about various thing  
22      during oral argument, I agree with the parties.  
23      Those issues ultimately -- I'm convinced by those  
24      arguments of counsel. Those things are just  
25      simply not before me.

1                   And -- including the -- whether or not  
2 this type of arrangement is not, per se, not  
3 allowed. I'm not deciding that that today. The  
4 U.S. Trustee did not argue it. That's not to say  
5 how I decide that one way or the other. But it's  
6 just not before me. I have all the facts in this  
7 case, and the facts in this case point to  
8 \$1285.50 being allowed as a fee. And that Ms.  
9 Ryan is not required to pay any more than that  
10 amount.

11                  I will issue a very brief order with a  
12 summary of what I said today. Hopefully, in a  
13 manner that a layman can understand so that Ms.  
14 Ryan can read that and understand what I did not  
15 decide today as well so she understands what's  
16 happened here.

17                  And I will require that Mr. Russell get  
18 a copy of that to Ms. Ryan as well.

19                  So, again, it's very important that  
20 counsel understand what I'm not deciding here  
21 today and that these -- if they were hoping for -  
22 - if either one of them or both were hoping for  
23 some broad pronouncements, almost to the  
24 legislative nature, it's just not happening.  
25 Those issues were not before me. The facts of

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1 this case are fairly unique. And a result could  
2 be quite different. I'd also note that some of  
3 the things the U.S. Trustee has complained of in  
4 the disclosures are -- can easily be met even if  
5 I'd agree in this case that they were sufficient,  
6 in future cases, many of the things that the U.S.  
7 Trustee has complained of could be easily met and  
8 supplemented in disclosures to potentially avoid  
9 this type of problem in the future -- or this  
10 type of motion in the future.

11 So, that is something to give some  
12 thought to. At least in this district.

13 And with that, I've got nothing else.  
14 I will put on the record here today -- as I did  
15 mention, I will -- again, not a chance to argue  
16 with me, but if there's a procedural issue or  
17 something along those lines, you certainly can  
18 raise it now.

19 Mr. Kreuziger, is there anything you  
20 want raise with me before we go off the record?

21 MR. KREUZIGER: No, Your Honor. Thank  
22 you.

23 THE COURT: Thank you for your time.

24 Mr. Garrison, anything you want to  
25 raise with me before we go off the record?

1                   MR. GARRISON: Just to thank you for  
2 your attention to detail and your fairness,  
3 Judge. It's been a pleasure appearing before you  
4 and I appreciate again the privilege of  
5 (indiscernible).

6                   THE COURT: Well, thank you, sir. And  
7 I do want to -- I should have mentioned this. I  
8 was very impressed with how the two of you got  
9 along in this case and how you both argued this  
10 case.

11                  I read those deposition transcripts and  
12 they were a pleasure to read. The two of you  
13 were clearly polite to each other and rarely  
14 objected. And if you did object, it was  
15 unobtrusive and it was for the record. And I was  
16 extremely impressed. I think back to my days in  
17 practice and some of the things attorneys did --  
18 and I think things have changed since those day,  
19 by the way.

20                  But putting that aside, the two of you  
21 clearly minimized attorney's fees, cooperated,  
22 understood you had a difference of opinion, but  
23 also understood that you needed to be  
24 professional and you were.

25                  And I was extremely impressed. And

1 also, I was extremely impressed with your oral  
2 arguments. By the way, I -- went off on some  
3 tangents there, certainly. This was a new issue  
4 for me, and I wanted to explore certain things  
5 and certain things that I've now told you today,  
6 I don't believe were before me. So, I made you  
7 all go up a couple of blind alleys.

8 And I'm sorry I did that, but I wanted  
9 to get my arms around this thing. And I, again,  
10 appreciate your patience in doing that. The two  
11 of you indulged me and did that. And I very much  
12 appreciate that. So, I, again, I can't tell you  
13 -- reading those deposition transcripts, how  
14 happy that made me feel to see that people were -  
15 - to see how two attorneys can get along and not  
16 play games and let the evidence come out in a way  
17 that's appropriate and object when it is  
18 appropriate but also not to do so just simply to  
19 coach witnesses or to block things.

20 And so, again -- and it's also --  
21 again, extremely impressed that you were able to  
22 submit those and not have live testimony or semi-  
23 live testimony and minimizing Ms. Ryan's time,  
24 which is very important. And for that matter,  
25 Mr. Russell's time.

1                   And so, I -- thanks to your  
2 cooperation, I think you minimized some of the  
3 pain that might have occurred in this case or did  
4 occur in this case.

5                   So, again, I thank you both very much.  
6 I hope you both remain healthy and safe and have  
7 a good remainder of your week.

8                   I'll get the orders -- I'll get  
9 everything filed today so you'll be seeing those  
10 trickling out during the afternoon.

11                  Thank you all very much. And again,  
12 have a good afternoon.

13                  MR. KREUZIGER: Thank you, Judge.

14                  MR. GARRISON: Thank you, Your Honor.

15                  (Whereupon these proceedings were concluded.)

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I N D E X

RULINGS

Fees reduced to \$1285.50

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing

4 transcript is a true and accurate record of the proceedings.

5

6 *Sonya M. Ledanski Hyde*

7

8 Sonya Ledanski Hyde

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13

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15 Date: October 15, 2020

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